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Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Sent via e-mail and FedEx

Re: MUR 7185 (Response of National Republican Congressional Committee-NRCC)

Dear Mr. Jordan,

This Response is submitted by the undersigned counsel on behalf of the NRCC and Keith A. Davis, in his capacity of Treasurer of NRCC, in response to the Complaint designated as Matter Under Review 7185.

On November 3, 2016, the FEC received this Complaint against NRCC. NRCC first became aware of the Complaint on November 9, 2016 when it received correspondence from the FEC Assistant General Counsel Jeff Jordan attaching the Complaint which alleges a violation of FEC regulations and excessive contributions to Sheriff Scott Jones for Congress (the "Campaign") resulting from republication of materials prepared by the Campaign in advertisements paid for by the NRCC.

As explained in more detail below, this Complaint treads well-worn ground. The Commission has repeatedly declined to find a violation when confronted with materially similar facts in complaints lodged against political committees and candidates. Consistent with these prior matters, the Commission should find no reason to believe the NRCC violated the Act and dismiss this matter.

I. Factual Background

On or about October 4, 2016, NRCC made expenditures to produce and distribute an advertisement titled "Dirty Money." This advertisement was made and aired as an independent expenditure and was reported to the Commission accordingly.¹ No portion of the costs of this advertisement were in any way an in-kind contribution to the Sheriff Scott Jones for Congress campaign, either as a result of republication or through any other theory.

¹ See <http://docquery.fec.gov/cgi-bin/forms/C00075820/1102752/se>

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“Dirty Money” is a 30-second advertisement that contains a total of between sixteen and seventeen seconds of so-called “B-roll” footage of Sheriff Scott Jones. This B-roll footage was obtained from a publicly-available video placed on YouTube, titled “Scott Jones B roll,” that is available at <https://www.youtube.com/watch?v=ASB6ym0xd2U>. “Scott Jones B roll” consists of generic “background video footage” that “contains no discernible message.”² The 16-17 seconds of B-roll footage is incorporated into the 30-second NRCC advertisement, serves only as background imagery, and in no way supplants NRCC’s “own message” which is conveyed through NRCC’s “own text, graphics, audio, and narration.”³

The NRCC advertisement also features footage of Sheriff Scott Jones’s opponent, Representative Ami Bera, to provide a contrasting message of the two candidates that was created by NRCC. All audio content and on-screen messaging was created by NRCC.

II. Legal Discussion

The independent use of a candidate’s B-roll footage has become commonplace, and many candidates make such footage available to the public. For example, Sheriff Jones’s opponent, Representative Ami Bera, placed a B-roll video on his campaign’s YouTube channel entitled “Bera ‘B-Roll.’”

While the Commission has divided on the applicability of the Commission’s republication regulations to a political committee’s independent use of a small amount of a campaign’s B-roll footage, the Commission revisits the applicability of republication rules each election cycle. Beginning with MUR 5879 (Democratic Congressional Campaign Committee), and continuing with MUR 6357 (American Crossroads), MUR 6603 (Chandler), MUR 6617 (Vilsack), MUR 6667 (Bustos), MUR 6777 (Kirkpatrick), MUR 6801 (Senate Majority PAC), MUR 6870 (American Crossroads), and MUR 6902 (Franken), the Commission has consistently dismissed B-roll complaints. This matter should be no different.

A. MUR 5879 (Democratic Congressional Campaign Committee)

MUR 5879 (Democratic Congressional Campaign Committee), a case dating to 2006 but not decided until 2009, involved allegations that the DCCC aired an advertisement that incorporated video originating from a campaign committee. The DCCC first requested footage directly from Harry Mitchell for Congress, and subsequently “[t]he Mitchell Committee’s media vendor then apparently sent to the DCCC footage of the candidate that it had on hand.”⁴ According to OGC’s findings, “the Mitchell Committee provided the DCCC with a copy of the raw video footage used in” a Mitchell campaign advertisement “via the Mitchell Committee’s

² Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 5879 at 8.

³ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 6357 at 4.

⁴ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 5879 at 2.

media vendor.”⁵ This footage was also uploaded by the Mitchell campaign “to an internet server, making it available for download to the general public.”⁶ The footage used by the DCCC in its own advertisement consisted of “audio-free clips of Mitchell talking to people at a park and meeting with seniors” – *i.e.*, B-roll footage. “The video footage at issue ... comprised approximately fifty percent (50%) of the DCCC’s television advertisement.”⁷

Three Commissioners voted against finding a violation under these facts and explained that:

[T]he DCCC’s advertisement was an expression of its own message. The fact that it excerpted fifteen seconds of B-roll images from three minutes of candidate footage did not result in the dissemination, distribution, or republication of campaign materials, nor did it otherwise convert the independent expenditure by the DCCC into an in-kind contribution. Consistent with prior Commission precedents and interpretations regarding republication, we voted to reject OGC’s recommendation to enter into pre-probable case conciliation with the DCCC prior to finding probable cause.⁸

The same Commissioners noted, “the Commission’s longstanding approach that wholesale copying of candidate materials constitutes republication, but partial use of such materials in connection with one’s own protected speech is not legally problematic.”⁹ “The [DCCC’s] ad clearly did not fit within the traditional view of republication as ‘the reprinting and dissemination of a candidate’s mailers, brochures, yard signs, billboards, or posters – in other words, materials that copy and convey a campaign’s message. Instead, it constituted an expression of the sponsor’s own views.’”¹⁰ This conclusion was based, in part, on legislative history presented by the respondents that shows that the underlying purpose of the republication provision is to “distinguish[] between independent expressions of an individual’s views and the

⁵ MUR 5879, General Counsel’s Report #2 at 4.

⁶ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 5879 at 3.

⁷ MUR 5879, General Counsel’s Report #2 at 1-2.

⁸ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 5879 at 4.

⁹ *Id.* at 5; *see also* Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub in MUR 5743 (Sutton) at 4-5 (“The downloading of a photograph from a candidate’s website that is open to the world, for incidental use in a larger mailer that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute the ‘dissemination, distribution, or republication of candidate campaign materials.’”).

¹⁰ *Id.* at 7-8; *see also* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 5996 (Tim Bee) at 3 (“The traditional type of republication involves the reprinting and dissemination of a candidate’s mailers, brochures, yard signs, billboards, or posters – in other words, materials that copy and convey a campaign’s message.”).

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use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."¹¹

In other words, the relevant question in these cases is whether incorporating generic, B-roll footage that is free of the candidate's own messaging and content into an independent communication is "indistinguishable in substance from the direct payment of cash to a candidate."¹²

B. MUR 6357 (American Crossroads)

The Commission also did not find reason to believe in MUR 6357 (American Crossroads). In that matter, the respondents incorporated into their own advertisement "unembellished footage of Rob Portman and his family on the campaign trail" that was made available in a YouTube video titled, "Portmans Celebrate Memorial Day."¹³ As three Commissioners noted, the American Crossroads advertisement:

[C]onsist[ed] of numerous fleeting images – including several brief snippets of Portman Committee video footage – that are incorporated into a checkerboard-style graphic and set alongside text, images, and visuals that are unique to this advertisement. Moreover, American Crossroads adds its own audio and narration to this spot.¹⁴

As in MUR 5879, the Commissioners concluded that "[t]he activity at issue here does not constitute 'republication of campaign materials' as contemplated by the Act and Commission regulations."¹⁵ Instead, "the generic Portman footage is shown only in a portion of the American Crossroads advertisement, which does not repeat the entirety, or even any substantial portion, of the Portman Committee footage," and "the few fleeting images from the Portman Committee footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message."¹⁶

The Commissioners further explained:

The Act's republication provision is designed to capture situations where third parties, in essence, subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall

¹¹ *Id.* at 4 quoting H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

¹² *Id.*

¹³ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 6357 at 2.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 4.

message are devised by the candidate. But clearly that is not what happened here. American Crossroads did not repeat verbatim the Portman Committee's message; rather, it created its own. Therefore, we concluded that the American Crossroads advertisement did not constitute "a republication of campaign materials."¹⁷

C. Subsequent Statements of Reasons (MUR 6603 (Ben Chandler for Congress); MUR 6777 (Kirkpatrick for Arizona); MUR 6801 (Senate Majority PAC); MUR 6870 (American Crossroads); and MUR 6902 (Al Franken for Senate))

Three Commissioners have subsequently incorporated the reasoning in MUR 6357 into similar matters, reiterating that:

The Act's republication provision is designed to capture situations where third parties, in essence, subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.¹⁸

The Commission should echo this reasoning once again because, in this matter, the NRCC "did not repeat verbatim the [candidate's] message; rather it created its own."¹⁹

III. Analysis

In the advertisement at issue, NRCC utilized B-Roll footage for approximately 16-17 seconds of its 30-second independent expenditure advertisement in support of Scott Jones' campaign for the United States House of Representatives for California's 7th District. At no point did NRCC utilize the candidate's written or audio messaging. Rather, NRCC used B-Roll footage that was published on the candidate's publicly accessible YouTube page to supplement the messaging that NRCC itself created.

Just as in MUR 6357 and its progeny, "the generic [Jones] footage is shown only in a portion of the [NRCC] advertisement, which does not repeat the entirety, or even any substantial portion, of the [Jones] footage," and "the few fleeting images from the [Jones] footage are incorporated into a communication in which [NRCC] adds its own text, graphics, audio, and narration to create its own message."²⁰

¹⁷ *Id.*

¹⁸ *See, e.g.*, MUR 6603 (Ben Chandler for Congress); MUR 6777 (Kirkpatrick for Arizona); MUR 6801 (Senate Majority PAC); MUR 6870 (American Crossroads); and MUR 6902 (Al Franken for Senate); Statement of Reasons, Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman, at 1.

¹⁹ *Id.*

²⁰ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 6357 at 4.

Complainant contends that the one to two additional seconds of B-Roll footage in excess of 50% of the advertisement warrants a different result. The Commission, however, has never purported to apply a "50% Rule," and doing so now would create an arbitrary and capricious delineation of permissible versus impermissible use of B-Roll footage. The Commissioners' Statements of Reasons have all focused on the nature of the use of the B-roll, rather than on the amount of footage used. Specifically, the Commission's analysis has focused only on whether the "background video footage" is used in a manner that "cop[ies] and convey[s] a campaign's message," or in a manner that is part of "an expression of its own message."²¹ Stated differently, the common thread in the B-roll cases is that "[t]he silent footage at issue contains no discernible message" – any substance and meaning is provided by the entity that incorporates the footage into its "own message."²²

The relevant question is not how much B-roll footage was utilized, but whether the NRCC created and distributed its *own* message, as opposed to redistributing *the candidate's* message. In the advertisement at issue, all audio content, all on-screen graphics and text, and approximately half of the video content featured in the advertisement were created by the NRCC. The messaging conveyed in the advertisement was solely, and unquestionably, the NRCC's own messaging.

IV. Conclusion

For the reasons set forth above, the Commission should find no reason to believe the NRCC violated the Act or Commission regulations and dismiss this matter.

Sincerely,



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Mike Bayes
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Counsel to NRCC

²¹ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 5879 at 8, 4.

²² Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen in MUR 5879 at 8, 4; see also Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 5996 (Tim Bee) at 3 (noting that "[t]he photograph did not convey any campaign content or message").